not *raise* issues for parties to address. *See* Pet. 26-27. Thus, Justice Scalia's observation in *Davis* v. *United States*, 512 U.S. 452, 464 (1994) (concurring opinion), that the Constitution does not prohibit courts from raising issues not presented by the parties has no bearing here.[9] Wausau also recognizes that courts may in some cases *decide* issues *sua sponte*, particularly where such disposition is logically antecedent to the resolution of a claim the parties have put before the court. *See* Pet. 27-28. But there are limits to that authority, and those limits were transgressed here.

JCI has not pointed to any other case in which an appellate court reached out to decide a matter that was separate and distinct from the claim that the parties had presented and argued to it for resolution. Almost all of the cases JCI cites involved situations where the Court decided a "threshold" issue or question "antecedent" to the claim presented by the parties to the Court for resolution.[10] Such cases are straightforward applications of the principle that "*when an*

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[9] The distinction between raising issues for the parties to address and deciding issues without argument from the parties is demonstrated by *Dickerson* v. *United States*, 530 U.S. 428 (2000), where the Court resolved the issue that the majority declined to consider in *Davis*. In *Dickerson*, although the government declined to argue that a confession obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), could nonetheless be admitted under 18 U.S.C. § 3501, the court of appeals raised that issue and entertained briefing and argument on the issue. *See United States* v. *Dickerson*, 166 F.3d 667, 680 n.14 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000). Similarly, in *Boynton* v. *Virginia*, 364 U.S. 454 (1960) (cited in Opp. 14), although the petition for certiorari presented only constitutional questions for review, the Court questioned the parties in writing about the related statutory issue that it ultimately found dispositive, and the parties briefed that issue. *See Boynton*, Opp. App. 12; Pet. Br. 20-22; Resp. Br. 6-9; U.S. Amicus Br. 5-9.

[10] *E.g.*, *Arcadia, Ohio* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1990); *Teague* v. *Lane*, 489 U.S. 288, 300-301 (1989). Although *United States* v. *IBM Corp.*, 517 U.S. 843, 854-856 (1996), does not fit into this category, that is so only because—quite the opposite of JCI's characterization (Opp. 13-14)—the Court *declined* to overrule its precedent on a ground not advanced by the parties.

issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *United States Nat'l Bank of Ore.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (emphasis added; internal quotation marks and citation omitted).[11] Similarly, in cases such as *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), *Mapp* v. *Ohio*, 367 U.S. 643 (1961), *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), the Court determined that, rather than apply the legal rule invoked by the parties to the claim presented to the Court, it would be more appropriate to reconsider the fundamental soundness of that rule. By contrast, in this case, the Wisconsin Supreme Court reached out to decide an issue that was never argued by the parties *and* was separate and distinct from the claim presented to it.

Moreover, JCI is notably silent about the large and consistent body of case law recognizing the due process principle that a court may not dispose of a party's claims without notice and an opportunity to be heard (*see* Pet. 20-24). Nor does JCI suggest any distinction between the conduct prohibited by that body of law and the Wisconsin Supreme Court's action here. Both involve a court's *sua sponte* resolution of an issue not presented to it, without notice or an

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[11] To similar effect is *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999). In that case, the petition for certiorari presented the following question: "'In what circumstances may punitive damages be awarded under Title VII . . . .'" *Id.* at 540 (quoting Pet. i). Although the parties focused on the evidentiary showing necessary to justify an award of punitive damages, this Court also addressed the proper standard for imputing liability to an employer in the punitive damages context. *Id.* The Court did not reach out to decide a separate claim or create a wholly distinct legal standard. Rather, the Court addressed an issue that was "intimately bound up" with the issue focused on by the parties and logically subsumed within the question presented. *See id.* Moreover, in *Kolstad*, the issue was briefed by *amicus curiae* and argued by the parties. *See id.* at 540-541 (citing briefs and oral argument).

opportunity to be heard, and both constitute a denial of due process.

3. JCI's contention that "[i]t is not a 'due process' violation when a court makes new law, simply because some party who will be adversely affected by the discharge of that function, claims not to have had an opportunity to completely 'brief' the issue" (Opp. 15) turns the Due Process Clause on its head. "[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971).

Officials acting in a *non-adjudicative capacity*, such as legislators and administrators, are not necessarily required to provide notice and an opportunity to be heard to all who may be potentially affected before enacting a rule of general applicability. But due process dictates that *judicial action*, which has a particularized effect on the parties before a court, requires notice and an opportunity to be heard. This distinction is borne out in the very case on which JCI relies (Opp. 15-16), *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445-446 (1915) (distinguishing *Londoner* v. *Denver*, 210 U.S. 373, 385-386 (1908)). And this Court has explicitly required that "deprivation of life, liberty or property *by adjudication* be preceded by notice and opportunity for hearing...." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added). Here, Wausau was not a bystander to a generally applicable change in law, but an actual party before the court that was directly affected by its adjudication. Accordingly, the court's failure to provide notice and an opportunity to be heard before deciding the "suit" issue against Wausau both implicated and violated its due process rights.

JCI also fails to distinguish *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930), from this case. In *Brinkerhoff-Faris*, the plaintiff challenged a county's tax assessment as discriminatory. Rather than adjudicating

that discrimination claim on the merits, the Missouri Supreme Court dismissed the claim on a ground neither raised nor argued by the parties—namely, that the plaintiff had not sought relief from the state tax commission, a remedy that had long expired. In so doing, the court overruled its prior holding that the state tax commission lacked authority to hear such claims. *Id.* at 675-677. This Court reversed on due process grounds, explaining:

> Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule [itself]. . . . But, while it is for the state courts to determine the . . . law of the state, they must, in so doing, accord the parties due process of law.

Id. at 681-682 (footnote omitted). This Court was concerned not only with the unavailability of relief from the tax commission, but also with the state court's own failure to hear the claim. Thus, although, as JCI points out (Opp. 16), the Court stated that "if the administrative remedy were still available to the plaintiff, there would be no denial of due process," 281 U.S. at 682 n.9, that point only emphasizes that this Court took issue with the plaintiff's inability to present its claim in *any* forum. In this case, of course, the only possible forum in which Wausau could have presented its substantial arguments against overruling *Edgerton* on the "suit" issue was the Wisconsin Supreme Court. By deciding that issue without giving Wausau notice or an opportunity to be heard, the Wisconsin Supreme Court denied Wausau *any* forum in which to present its claim.

4. JCI errs in its characterization of Wausau's property interest at stake (Opp. 17-19). As a defendant to this suit for monetary relief, Wausau stands to suffer direct and substantial pecuniary harm from the surprise resolution of the "suit" issue. Indeed, even though judgment has not been

entered, Wausau has already offered a defense to JCI, in light of the Wisconsin Supreme Court's disposition of the "suit" issue and the preclusively costly risk that Wausau could be estopped from raising coverage defenses under Wisconsin state law if it failed to provide a defense (Pet. 17-18; CICLA Br. 17-18). Wausau's pecuniary interest is clearly the type of property that requires the protections of due process. "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982).

Of course, the question here is not whether courts may overrule their precedents establishing rules of liability. Courts plainly have the authority to do so, even if such action adversely affects the litigants' property interests. But precisely because constitutionally protected property interests are implicated in such cases, such judicial action must be accompanied by the basic elements of due process, notice and an opportunity to be heard, no less than when the state revokes a license, terminates welfare benefits, or garnishes wages.[12] Wausau "seeks only the right to contest on the merits" whether JCI's receipt of a PRP letter was a "suit" within Wausau's defense obligation, and "[t]hat right . . . is just what due process affords it." *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 472 (2000).

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For the foregoing reasons and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[12] *Bell* v. *Burson*, 402 U.S. 535 (1971) (driver's license and vehicle registration); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Sniadach* v. *Family Fin. Corp.*, 395 U.S. 337 (1969) (wage garnishment).

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